STATE OF MICHIGAN

COURT OF APPEALS

DANIEL J. TRAPP,

Plaintiff-Appellant,

v

TERRY L. VOLLMER,

Defendant-Appellee.

UNPUBLISHED
June 16, 2011

No. 297116
Kent Circuit Court
LC No. 08-011944-CK

Before: SHAPIRO, P.J., and O'CONNELL and OWENS, JJ.

PER CURIAM.

Plaintiff Daniel Trapp appeals by right the trial court's order granting defendant Terry Vollmer summary disposition and dismissing plaintiff's complaint. We affirm.

Plaintiff was employed by Electro Chemical Finishing Company (ECF), which defendant founded. In 1998, the parties entered into an agreement, ¶ 3 of which is the subject of this litigation. It read:

> Vollmer and Trapp will develop a succession plan whereby they will either sell their stock to an employee stock option plan (ESOP) or exchange their stock through a merger or acquisition. This succession plan is to be in effect by March 1, 2005. Any changes or alternative resolutions must be mutually agreed upon by both parties.

No succession plan or alternative solution was ever implemented.

On appeal, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition on his breach of contract and shareholder oppression claims. We review de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). We also review de novo a trial court's interpretation of a contract. *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 611; 792 NW2d 344 (2010). Similarly, we review de novo questions of statutory interpretation. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the

moving party is entitled to judgment as a matter of law." *Id*. When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id*.

With regard to plaintiff's breach of contract claim, the issue is whether ¶ 3 fails for lack of material terms. Michigan law recognizes that parties may enter into an enforceable contract that requires them to execute another contract at a later date. *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 359; 320 NW2d 836 (1982); *Prof Facilities Corp v Marks*, 373 Mich 673, 679; 131 NW2d 60 (1964); *Hansen v Catsman*, 371 Mich 79, 82; 123 NW2d 265 (1963). However, to be valid, a contract to contract must contain all the essential elements that are to be incorporated into the final contract. *Opdyke*, 413 Mich at 359, citing *Socony-Vacuum Oil Co v Waldo*, 289 Mich 316, 323; 286 NW 630 (1939). If the agreement leaves open any material term to be decided in the future, no contract is made. *Hansen*, 371 Mich at 82.

Plaintiff argues that, at minimum, a question of fact exists regarding whether ¶ 3 constitutes an enforceable agreement to agree. We disagree. In *Opdyke*, 413 Mich 79, our Supreme Court stated that "certain matters" are expressly left to be negotiated in the future is some evidence that the parties did not intend to be bound by the agreement. *Opdyke*, 413 Mich at 359-360. Thus, while essential terms are required to make a valid agreement to agree, the lack of non-essential terms does not automatically invalidate the agreement.

In this case, ¶ 3 identifies the parties (Vollmer and Trapp), the subject matter (the succession plan), and the implementation date (March 1, 2005). It also provides through the use of the word "their" that the succession plan would include both parties either selling or exchanging their stock—"Vollmer and Trapp . . . will either sell their stock . . . or exchange their stock . . . ." It further identifies who will be responsible for the succession plan's development, both parties—"Vollmer and Trapp will develop a succession plan . . . ." However, it contains no specifics regarding the succession plan such as a mechanism for determining the stock purchase price and the plan's components. On its face, ¶ 3 appears to be an agreement to, in good faith, develop a succession plan and to agree on the plan's details in the future, presumably when the parties committed to a purchaser. Such an interpretation is bolstered by plaintiff's contention that defendant breached the agreement when he allegedly refused to sell ECF, i.e., he did not pursue in good faith the implementation of a succession plan.

However, in Michigan, agreements to negotiate have been held unenforceable for lack of material terms. *Prof Facilities*, 373 Mich at 678-679. As stated in 1 Corbin on Contracts § 4.1, p 531:

> When the evidence clearly shows, either by reason of definite language or otherwise, that the only (and the complete) subject matter that is under consideration is left for further negotiation and agreement, there is no contract, not for vagueness or indefiniteness of terms but for lack of any terms. The parties may use words constituting an "agreement to agree" or an "agreement to negotiate", with the result that they feel a sense of "obligation". This is merely an obligation to discuss terms . . . not an obligation . . . to render any other future performance.

Here, ¶ 3 contains no particulars with regard to its subject matter: the succession plan. As such, it is merely an unenforceable agreement to negotiate, rather than an enforceable agreement to agree, because it failed to outline any of the succession plan terms. Accordingly, the trial court did not err in granting defendant summary disposition on plaintiff's breach of contract claim.[1]

Next, we address plaintiff's argument that the trial court erred in dismissing his shareholder oppression claim.[2] MCL 450.1489(1) allows a shareholder to sue for "acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder." "Willfully unfair and oppressive conduct" is defined in part as "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder." MCL 450.1489(3).

In *Franchino v Franchino*, 263 Mich App 172; 687 NW2d 620 (2004), the Court stated that "willfully unfair and oppressive conduct" refers to conduct that substantially interferes only with rights that automatically accrue to a shareholder by virtue of being a shareholder. Here, the affected interests plaintiff alleged pertained to defendant's compliance with ¶ 3. Implementation of a succession agreement is not an interest that accrued to plaintiff by virtue of being a shareholder. Thus, plaintiff could not maintain his shareholder oppression claim.

Plaintiff further argues that the 2006 amendment to MCL 450.1489(3) negated the portion of the *Franchino* decision that rejected the "reasonable expectations test." The *Franchino* Court rejected the "plaintiff's invitation to define the term 'oppression' to include 'conduct that defeats the reasonable expectations of a minority shareholder.'" *Franchino*, 263 Mich App at 186. It reasoned that a "reasonable expectations approach" that places the focus on the rights or interests of a shareholder would be inconsistent with a statute that places the focus on the actions of the majority like MCL 450.1489 does. *Id*. at 187-188. Applying such a test, plaintiff reasons that his shareholder oppression claim survives summary disposition. In an apparent reaction to the *Franchino* decision, the Legislature amended MCL 450.1489(3). It added: "[w]illfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder."

Plaintiff cites to the Legislature's addition of employment termination, without further explanation, and its specific reference to the "affected shareholder" as evidence of a change of

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[1] Based on our decision, we need not address plaintiff's issues pertaining to breach of the contract.

[2] Plaintiff's argument that the trial court's decision was premature because defendant did not raise the issue or comply with MCR 2.116(G)(3) and (4) is without merit. Defendant's summary disposition motion as to whether plaintiff could maintain his shareholder oppression claim was brought pursuant to MCR 2.116(C)(8) because he relied solely on plaintiff's complaint. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006).

focus to the impact on minority shareholders. We believe that the amendment's language evinces no such intent. The Legislature simply expressly defined the circumstances under which two types of majority conduct could be considered "willfully unfair and oppressive conduct." In doing so, it expanded with restrictions the type of shareholder interests that could properly be the subject of "willfully unfair and oppressive conduct" beyond those defined in *Franchino*. The focus remained on the majority's conduct in the context of terminating employment or limiting employment benefits, not on the reasonable expectations of a minority shareholder. Therefore, the 2006 amendment to MCL 450.1489(3) neither expressly adopted a reasonable expectations test in determining oppressive conduct nor provided a basis for us to disregard the *Franchino* decision thereby opening the door to adoption of the test. Accordingly, we conclude that the trial court did not err in granting summary disposition on plaintiff's shareholder oppression claim.[3]

Affirmed.

s/ Douglas B. Shapiro
/s/ Peter D. O'Connell
/s/ Donald S. Owens

[3] Based on our decision, we need not address whether plaintiff's claim is barred by the statute of limitations and whether the parties mutually agreed to extend the succession plan's implementation date.